

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF:)
)
)
)
)

Portland Harbor Superfund Site)
Portland, Multnomah County, Oregon)

Arkema Inc. and Bayer CropScience Inc.)

Respondents)

Proceeding Under Sections 104, 107, and)
122 of the Comprehensive, Environmental)
Response, Compensation, and Liability Act,)
42 U.S.C. §§ 9604, 9607 and 9622)
_____)

CERCLA Docket No. _____

**ADMINISTRATIVE SETTLEMENT
AGREEMENT AND ORDER ON
CONSENT FOR REMEDIAL DESIGN
AT RIVER MILE 7 WEST PROJECT
AREA**

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DRAFT

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent (Settlement) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and Arkema Inc. and ~~Bayer CropScience Inc.~~ (Respondents). This Settlement provides for the performance of 100% Remedial Design of the River Mile 7 West Project Area and the payment by Respondents of certain response costs incurred by the EPA, the Oregon Department of Environmental Quality, and the Tribal Governments at or in connection with the Work conducted under this Settlement, related to the selected remedy for the in-river portion of the Portland Harbor Superfund Site (the Site).

Commented [JK1]: This goes beyond remedial design and should be deleted.

2. This Settlement is issued under the authority vested in the President of the United States by Sections 104, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9607, and 9622 (CERCLA). This authority was delegated to the EPA Administrator on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to the EPA Regional Administrators by EPA Delegation Nos. 14-14-C (Administrative Actions Through Consent Orders, Jan. 18, 2017) and 14-14-D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders, Jan. 18, 2017). This authority has been re-delegated by the Region 10, Regional Administrator (Regional Administrator) to the Region 10, Director, Superfund and Emergency Management Division, and Program Managers thereunder by EPA Delegations R10 14-14-C and 14-14-D (April 15, 2019).

Commented [ES2]: EPA 10-16-19: this language does not require anything beyond RD but rather states that RD is related to the remedy selected in the ROD. Do not understand the objection

3. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the natural resource trustees for the Portland Harbor Site of negotiations with Respondents regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Settlement consistent with the process agreed to in the 2001 Memorandum of Understanding related to the Site.

4. EPA and Respondents recognize that this Settlement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement do not constitute an admission of any liability. Respondents ~~does~~ not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement, the validity of the findings of facts, conclusions of law, and determinations in Sections V (Findings of Fact) and VI (Conclusions of Law and Determinations) of this Settlement. Respondents agree to comply with and be bound by the terms of this Settlement and further agree that they will not contest the basis or validity of this Settlement or its terms.

II. PARTIES BOUND

5. This Settlement is binding upon EPA and upon Respondents and Respondents' successors and assigns. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondents' responsibilities under this Settlement.

6. Respondents are jointly and severally liable for carrying out all activities required by this Settlement. In the event of the insolvency or other failure of a Respondent to implement the requirements of this Settlement, the remaining Respondent shall complete all such requirements.

7. Each of the undersigned representatives certifies that she or he is fully authorized to enter into the terms and conditions of this Settlement on behalf of the Respondent for whom that representative signs and to execute and legally bind such Respondent to this Settlement.

8. Respondents shall provide a copy of this Settlement to each contractor hired to perform the Work required by this Settlement and to each person representing any Respondent with respect to the Work, and shall condition all contracts entered into under this Settlement on performance of the Work in conformity with the terms of this Settlement. Respondents or their contractors shall provide written notice of the Settlement to all subcontractors hired to perform any portion of the Work required by this Settlement. Respondents shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this Settlement.

III. STATEMENT OF PURPOSE

9. The purpose of this Settlement is to perform 100% Remedial Design (RD) at the River Mile 7 West Project Area. The U.S. Environmental Protection Agency (EPA) signed a Record of Decision for the Portland Harbor Superfund Site (Site) on January 3, 2017 (ROD) that selected Remedial Actions (RA) for the in-river portion of the Site from approximately river miles (RMs) 1.9 to 11.8. The ROD provides information about how Site data will influence RD, remedial construction, and future maintenance of remediated areas. The ROD states that the actual technologies assigned during RD will be dependent on a number of characteristics and environmental conditions to ensure that the final constructed remedy is appropriate for area-specific conditions, e.g., Sediment Management Areas (SMAs). The ROD also identifies post-ROD / RD sampling activities that will support and refine the Site's Conceptual Site Model (CSM) to implement RD and RA. Data collected since the ROD as part of the Portland Harbor Pre-Remedial Design Investigation (PDI) and Baseline Sampling Study (AECOM and Geosyntec, 2019) has been approved by EPA and, combined with Site data previously approved by EPA, and data collected for the River Mile 7 West Project Area pursuant to this Settlement, will be used to refine SMAs, select appropriate remedial technologies, and identify any uncontrolled sources of recontamination. This Settlement does not include performance of the RA for the River Mile 7 West Project Area.

IV. DEFINITIONS

10. Unless otherwise expressly provided in this Settlement, terms used in this Settlement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement or its attached appendices, the following definitions shall apply:

“Affected Property” shall mean all real property [within the River Mile 7 West Project Area](#) and any other real property where EPA determines, at any time, that access or land, water, or other resource use restrictions are needed to perform the Work under this Settlement Agreement.

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-9675.

“Day” or “day” shall mean a calendar day. In computing any period of time under this Settlement, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

“Effective Date” shall mean the effective date of this Settlement as provided in Section XXIX.

“Eligible Acre” or “Eligible Acreage” shall mean the acreage of the sediment management areas within the [River Mile 7 West Project Area](#), with the following qualifications:

1. The acreage of the sediment management areas will be calculated based on Figure 30 of the Record of Decision for the Portland Harbor Site, for SMA Alternative F Mod, as shown [on attached Appendix B](#) with the associated acreage. The Eligible Acres shown [on Appendix B](#) are used solely to provide a rough apportionment of funds to areas identified in the ROD as requiring active remediation and do not reflect, nor will be adjusted to incorporate, subsequent data collected, modifications to the ROD including explanations of significant differences, claims of errors in depictions in Figure 30 of the ROD, or actual acreage that is determined to require active remediation during design or any other process.
2. The work areas as of January 1, 2019 identified as the following CERCLA Docket Numbers, are excluded from the definition of Eligible Acres: CERCLA Docket No. 10-2004-0009 (Terminal 4 Removal Action Area); CERCLA Docket No. 10-2009-0255 (Gasco Sediments Site); CERCLA Docket No. 10-2013-0087 (RM11E Project Area); and CERCLA Docket No. 10-2019-0142 (Willamette Cove Project Area).
3. Eligible acreage will be calculated to the nearest 1/10th of an acre of the total Eligible Acres in the Settlement.
4. Each Eligible Acre, or portion thereof, may only be claimed once within the Site.
5. Eligible Acreage is determined at the time this Settlement is executed. If an existing order identified [above](#) is amended within the Offer Period to include 100% RD for Eligible Acres, then those Eligible Acres are eligible for funding. Eligible Acreage is determined at the time the amendment of the existing order identified in Appendix C is executed.

Commented [JK3]: During our September 9, 2019 call, EPA said it was going to require step out sampling possibly into the navigation channel if needed to define the SMA(s). How will that be accounted for in determining “Eligible Acreage?”

Commented [ES4]: EPA 12-26-19: updated now that Willamette Cove signed

Eligible Acreage, as determined at the time this Settlement is executed, is [X+Y] acres. Eligible Acreage within the Arkema SOW is [X] acres. Eligible Acreage within the Bayer CropScience SOW is [Y] acres.

“EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“EPA Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the EPA incurs from the Effective Date of this Settlement through the Notice of Work Completion pursuant to Section XXVII (Notice of Work Completion) in reviewing or developing deliverables submitted pursuant to this Settlement, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Settlement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Section IX (Property Requirements) (including, but not limited to, cost of attorney time), ¶ 72 (Work Takeover), ¶ 16 (Emergencies and Releases), ¶ 95 (Access to Financial Assurance), ¶ 17 (Community Involvement (including the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e)), and the costs incurred by EPA in enforcing the terms of this Settlement, including all costs incurred in connection with Dispute Resolution pursuant to Section XIV (Dispute Resolution) and all litigation costs. EPA Future Response Costs shall also include all response costs incurred in negotiating this Settlement or in connection with developing the SOW and related documents which Respondent has agreed to pay under this Settlement that have accrued pursuant to 42 U.S.C. § 9607(a) during the period from March 27, 2019 to the Effective Date.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“Interest Earned” shall mean interest earned on amounts in the Portland Harbor Arkema or Bayer CropScience Disbursement Special Accounts, which shall be computed monthly at a rate based on the annual return on investments of the EPA Hazardous Substance Superfund. The applicable rate of interest shall be the rate in effect at the time the interest accrues.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

Commented [NJ5]: IN 12/27: need to define the eligible acreage within each SOW, and make sure that together, the acreage is the same as the eligible acreage for the entire RM 7W project area.

Commented [JK6]: Bayer attempted to reach agreement with the property owner in the River Mile 7 West Project Area, Siltronic, but those efforts were not successful. One of the reasons for attempting reach agreement was securing access. Request this be deleted as to the Siltronic property. Siltronic is a liable party and this likely would not be an issue if Siltronic would agree to be a performing party.

Commented [ES7]: EPA 10-16-19: see proposed edit

Commented [A8]: 7-15-19 EPA: we will not know the exact amount of costs EPA incurred in negotiating the settlement until sometime after the execution date. We can further discuss the date ranges applicable for these costs

Commented [ES9]: EPA 12-26-19: deleting as won't have this number at time ASAOC signed but should shortly thereafter

Commented [MS10R9]: Can EPA provide an estimate of the response costs incurred to date?

“Non-Settling Owner” shall mean any person, other than Respondents, that owns or controls any Affected Property. The phrase “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by Non-Settling Owner.

“ODEQ” shall mean the Oregon Department of Environmental Quality and any successor departments or agencies of the State.

“ODEQ Response Costs” shall mean all direct and indirect costs that ODEQ incurs in coordinating and consulting with EPA in conjunction with EPA’s planning and in coordinating and consulting with EPA in conjunction with EPA’s planning and implementation of this Settlement. ODEQ Response Costs are only those costs incurred to fulfill the requirements of this Settlement, including review of plans, reports, and assessments prepared pursuant to this Settlement; and scoping, planning, and negotiating this Settlement, but excluding any costs related to natural resource damages assessments, liability or restoration or any costs related to ODEQ oversight or enforcement of upland or upriver investigation or source control by the owners or operators of those upland or upriver sources.. ODEQ Responses Costs are only those costs that are not inconsistent with the NCP, 40 C.F.R. Part 300, and are recoverable response costs pursuant to Sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604 and 9607. ODEQ Response Costs shall not include the costs of oversight or data gathered by ODEQ concerning any other response action or Settlement Agreement associated with the Site. ODEQ Response Costs shall not include any direct or indirect costs incurred in relation to this Settlement prior to March 27, 2019.

“Owner Respondent” shall mean a Respondent who owns or controls some of the Affected Property. The phrase “Owner Respondent’s Affected Property” means Affected Property owned or controlled by Owner Respondent.

“Paragraph” or “¶” shall mean a portion of this Settlement identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean EPA and Respondents.

“Performance Standards” or “PS” shall mean the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the ROD.

“Performing Parties” shall mean the Respondents under this Settlement with EPA.

“Portland Harbor Arkema and Bayer CropScience Disbursement Special Accounts” shall mean the special accounts, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and ¶ 41 (Creation of Arkema and Bayer CropScience Disbursement Special Account).

“Portland Harbor Remedial Design Special Account” or “RD Special Account” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), through

the Settlement Agreement for Funding Remedial Design, CERCLA Docket no. 10-2019-0094.

“Portland Harbor Special Account” shall mean the special account within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3) through prior settlements related to the Site.

“Portland Harbor Superfund Site” or “Site” for purposes of this Settlement shall mean the in-river portion of the site in Portland, Multnomah County, Oregon listed on the National Priorities List (NPL) on December 1, 2000, 65 Fed. Reg. 75179-01 and for which a final remedy was selected in the January 2017 Record of Decision. As described in the Record of Decision, the Site extends in-river from approximately river mile (RM) 1.9 to 11.8.

“River Mile 7 West Project Area” shall mean for purposes of this Settlement the active cleanup area designated on Figure 31c of the ROD between approximately River Mile 6.5 and River Mile 7.6 on the west side of the Willamette River, and more specifically depicted on the map attached as Appendix B. The River Mile 7 West Project Area includes all riverbanks from top of the bank to river.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the Site, signed on January 3, 2017, by the Administrator of EPA, and all attachments thereto as the same may be modified or amended from time to time including, but not limited to, pursuant to any subsequent ROD amendment or Explanation of Significant Differences. A copy of the ROD can be found at <https://semspub.epa.gov/work/10/100036257.pdf>.

“Remedial Action” or “RA” shall mean the remedial action selected in the ROD.

“Remedial Design” or “RD” shall mean those remedial design activities to be undertaken to develop the final plans and specifications for the RA as stated in the SOWs depicted as the River Mile 7 West Project Area on the map attached as Appendix B.

“Respondents” shall mean Arkema Inc. and Bayer CropScience Inc.

“Section” shall mean a portion of this Settlement identified by a Roman numeral.

“Settlement” shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXVI (Integration/Appendices)). In the event of conflict between this Settlement and any appendix, this Settlement shall control.

“Settlement Agreement for Funding Remedial Design” shall mean the settlement agreement entered into by the EPA and the Settling Funding Parties under CERCLA Docket No. 10-2019-0094.

“Settling Funding Parties” shall mean the City of Portland and State of Oregon, by and through its Department of Transportation and its Department of State Lands.

“Statements of Work” or “SOWs” shall refer to the documents describing the activities for which Respondents, between themselves, have agreed to take lead responsibility. As between Respondents, Arkema will be lead for work set forth in Appendix A1 (the Arkema SOW) and Bayer CropScience will be lead for work set forth in Appendix A2 (the Bayer CropScience SOW). However, Respondents are both responsible for all Work required to be performed under this ASAOC reflected in both SOWs.

“Supervising Contractor” shall mean the principal contractor retained by each Respondent to supervise and direct the implementation of the Work under this Settlement.

“Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“Tribal Governments” shall mean the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Grand Ronde Community of Oregon, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Nez Perce Tribe. References to “Tribal Governments” in this Settlement may be a reference to an individual tribe, the tribes collectively, or some combination thereof.

“Tribal Response Costs” shall mean all direct and indirect costs that the Tribal Governments and their employees, agents, contractors, consultants and other authorized representatives incur in coordinating and consulting with EPA in conjunction with EPA’s planning and implementation of this Settlement. Tribal Response Costs are only those costs incurred to fulfill the requirements of this Settlement, including review of plans, reports, and assessments prepared pursuant to this Settlement; development of common positions and coordination among the Tribes; briefings to tribal leaders and tribal communities; and scoping and planning, and negotiating this Settlement and budgets; participation in community involvement activities; negotiation and implementation of any response cost funding agreements with the Respondents; and the costs incurred in enforcing the terms of any response cost funding agreements with the Respondents, including all costs incurred in connection with dispute resolution and all litigation costs, but excluding any costs related to natural resource damages assessments, liability or restoration. Tribal Response Costs are only those costs that are not inconsistent with the NCP, 40 C.F.R. Part 300, and are recoverable response costs pursuant to Sections 104 and 107 of CERCLA, 42 U.S.C. §§ 9604 and 9607. Tribal Response Costs shall not include the costs of oversight or data gathered by Tribal Governments concerning any other response action or Settlement associated with the Site. Tribal Response Costs shall not include any direct or indirect costs incurred in relation to this Settlement prior to March 27, 2019.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA and any federal natural resource trustee.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any “hazardous substance” under ORS 465.200 *et seq.*

“Work” shall mean all activities and obligations that Respondents are required to perform within the River Mile 7 West Project Area under this Settlement, except those required by Section XI (Record Retention).

V. FINDINGS OF FACT

11. Based on available information and investigation, EPA makes the following findings, which Respondents neither admit nor deny:

a. Historical industrial, commercial, agricultural, and municipal practices and releases of contaminants dating back to the early 1900s contributed to the observed chemical distribution of sediments within the Site. Historical sources responsible for the existing contamination include, but are not limited to: ship building, repair and dismantling; wood treatment and lumber milling; storage of bulk fuels and manufactured gas plant (MGP) waste; chemical manufacturing and storage; metal recycling, production and fabrication; steel mills, smelters and foundries; electrical production and distribution; municipal combined sewer overflows; and stormwater from industrial, commercial, transportation, residential and agricultural land uses. Operations that continue to exist today include: bulk fuel storage; barge building; ship repair; automobile scrapping; recycling; steel manufacturing; cement manufacturing; operation and repair of electrical transformers; and many smaller industrial operations, as well as other commercial, agricultural, and municipal practices.

b. On December 1, 2000, the Portland Harbor Superfund Site was listed on the National Priorities List due mainly to concerns about contamination in the sediments and the potential risks to human health and the environment from consuming fish. The most widespread contaminants found at the Site include, but are not limited to, polychlorinated biphenyls (PCBs), polycyclic aromatic hydrocarbons (PAHs), and dioxins/furans.

c. In 2001, EPA entered into a Memorandum of Understanding for the Portland Harbor Site (the MOU) with the Oregon Department of Environmental Quality (ODEQ), National Oceanic and Atmospheric Administration within the Department of Commerce, the United States Fish and Wildlife Service within the Department of the Interior, the Oregon Department of Fish and Wildlife and the Tribal Governments. The MOU, among other things, established the roles and responsibilities between EPA and ODEQ on managing the upland and in-river portions of the Site and set up a framework for technical and legal coordination among EPA and the Natural Resource Trustees; and relative to the Tribal Governments it sought to acknowledge the federal government’s consultation requirements concerning the Portland Harbor Superfund Site, and to ensure the Tribal Governments’

participation in the response actions at the Portland Harbor Superfund Site.

d. The Tribal Governments have treaty-reserved rights and resources and other rights, interests, or resources in the Site. The National Oceanic and Atmospheric Administration, the United States Department of the Interior, the Oregon Department of Fish & Wildlife, and the Tribal Governments are designated Natural Resource Trustees overseeing the assessment of natural resource damages at the Site. To the extent practicable, EPA intends that the Work under this Settlement will be conducted so as to be coordinated with any natural resource damage assessment and restoration of the Portland Harbor Superfund Site. EPA intends to provide the Tribal Governments and the federal and state Natural Resource Trustees an opportunity to review and comment on plans, reports, and other deliverables submitted by Respondents to EPA under this Settlement.

e. A remedial investigation and feasibility study (RI/FS) was initiated in 2001 and completed in 2017. As part of the RI/FS, baseline human health and ecological risk assessments were conducted to estimate the current and future effects of contaminants in sediments, surface water, groundwater seeps, and fish tissue on human health and the environment. The risk assessments provided the basis for taking action and identified the contaminants of potential concern (COPCs) and exposure pathways that the remedial action should address.

f. The baseline human health risk assessment (BHHRA) estimated cancer risks and noncancer health hazards from exposures to a set of chemicals in sediments (both beach and in-river), surface water, groundwater seeps, and fish tissue from samples collected at the Site.

g. The baseline ecological risk assessment (BERA) estimated risks to aquatic and aquatic-dependent species exposed to hazardous substances associated with the in-river portion of the Site.

h. The BHHRA and BERA concluded that contamination within the Site poses unacceptable risks to human health and the environment from numerous contaminants of potential concern in surface water, groundwater, sediment, and fish tissue. The selected remedy reduced the COPCs to 64 contaminants of concern (COCs) that contribute the most significant amount of risk to the human and ecological receptors. See ROD, Appendix II, Tables 1–5.

i. A subset of the COCs, called focused COCs which spatially encompass the full list of COCs, was developed in order to simplify analysis and develop and evaluate remedial alternatives for the Site. The focused COCs include PCBs, PAHs, dioxins and furans, and DDX

j. PCBs are classified as probable human carcinogens. Children exposed to PCBs may develop learning and behavioral problems later in life. PCBs are known to impact the

human immune system and skin, especially in child receptors, and may cause cancer in people. Nursing infants can be exposed to PCBs in breast milk. PCBs can also bioaccumulate in fish, shellfish, and mammals. In birds and mammals, PCBs can cause adverse effects such as anemia and injuries to the liver, stomach, and thyroid gland. PCBs also can cause problems with the immune system, behavioral problems, and impaired reproduction.

k. PAHs are human health and ecological COCs. PAHs are suspected human carcinogens with potential to cause lung, skin, and bladder cancers with occupational exposure. Animal studies show that certain PAHs affect the hematopoietic, immune, reproductive and neurologic systems and cause developmental effects. They can cause inhibited reproduction, delayed emergence, sediment avoidance, and mortality. In fish, PAHs cause liver abnormalities and impairment of the immune system.

l. Dioxins and furans are human health and ecological COCs. Toxic effects in humans include reproductive problems, problems in fetal development or early childhood, immune system damage, and cancer. Nursing infants can be exposed to dioxins and furans in breast milk. Dioxins and furans can bioaccumulate in fish, shellfish, and mammals. Animal effects include developmental and reproductive problems, hemorrhaging, and immune system problems.

m. DDx, which represents collectively DDT and its primary breakdown products dichlorodiphenyldichloroethane (DDD) and dichlorodiphenyldichloroethene (DDE), are human health and ecological COCs. DDT is considered a possible human carcinogen. DDT and DDE are stored in the body's fatty tissues. In pregnant women, DDT and DDE can be passed to the fetus. Nursing infants can be exposed to DDx in breast milk. Laboratory animal studies showed effects on the liver and reproduction. These compounds can accumulate in fish, shellfish and mammals and can cause adverse reproductive effects such as eggshell thinning in birds.

n. The ROD requires active remediation (dredging, capping and enhanced natural recovery) at areas exceeding the remedial action levels (RALs) for the focused COCs and contaminated riverbanks adjacent to some of those areas, referred to as Sediment Management Areas (SMAs). The ROD allows approximately 1,774 acres of sediment to recover naturally. The ROD estimated the remedy would take 13 years to construct.

n. The ROD requires active remediation (dredging, capping and enhanced natural recovery) at areas exceeding the remedial action levels (RALs) for the focused COCs and contaminated riverbanks adjacent to some of those areas, referred to as Sediment Management Areas (SMAs). The ROD allows approximately 1,774 acres of sediment to recover naturally. The ROD estimated the remedy would take 13 years to construct.

o. [In December 2017, EPA entered an Administrative Settlement Agreement and Order on Consent for Pre-Remedial Design Investigation and Baseline Sampling with certain parties to fulfill certain data needs identified in the ROD. In June 2019, the results of the Pre-](#)

Remedial Design and Baseline Sampling were presented to EPA. The results data off from the Pre-Remedial Design and Baseline Sampling, accepted for use by EPA, will be used in the development of the remedial design for the River Mile 7 West Project Area.

p. Respondent, Arkema Inc. (previously known as ATOFINA Chemicals, Inc.), owns land and operated a chemical manufacturing plant at 6400 NW Front Avenue, Portland, Multnomah County, Oregon, at the time of disposal of a hazardous substance at the Site.

q. Respondent, Bayer CropScience, Inc. (previously known as Rhone-Poulenc, Inc. and Aventis Crop Science USA, Inc.) owned and operated a pesticide formulation and herbicide manufacturing facility on property within the Site, and at the time of disposal of hazardous substances at the Site.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

12. Based on the Findings of Fact set forth above and the administrative record, EPA makes the following determinations, which Respondents neither admit nor deny:

a. The Portland Harbor Superfund Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Site, as identified in the Findings of Fact above, includes “hazardous substance(s)” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Respondents are “persons” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Respondents are alleged by EPA to be potentially responsible parties under Section 107(a)(1) or (2) of CERCLA, 42 U.S.C. § 9607(a)(1) or (2), and each Respondent has agreed to enter into this Settlement.

e. The conditions described in the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The RD required by this Settlement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VII. SETTLEMENT AGREEMENT AND ORDER

13. Based upon EPA's Findings of Fact, Conclusions of Law, and Determinations set forth above, and the administrative record, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Settlement, including, but not limited to, all appendices to this Settlement and any amendments or modifications to this Settlement.

VIII. PERFORMANCE OF THE WORK

14. Coordination and Supervision

a. Project Coordinators.

(1) Each Respondent's Project Coordinator must have sufficient technical expertise to coordinate the Work. Respondent's Project Coordinator may not be an attorney representing any Respondent in this matter and may not act as the Supervising Contractor. Respondent's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work.

(2) EPA's designated Project Coordinator is Hunter Young and EPA's designated Alternate Project Coordinator is Davis Zhen

. EPA may designate other representatives, which may include its employees,

. EPA may designate other representatives, which may include its employees, contractors and/or consultants, to oversee the Work. EPA may arrange for ODEQ personnel to act as the authorized Project Coordinator for certain aspects of the RD Work

, subject to Respondent's agreement. EPA's Project Coordinator will have the same authority as a remedial project manager and/or an on-scene coordinator, as described in the NCP. This includes the authority to halt the Work and/or to conduct or direct any necessary response action when he or she determines that conditions within the River Mile 7 West Project Area constitute an emergency or may present an immediate threat to public health or welfare or the environment due to a release or threatened release of Waste Material.

(3) Each Respondent's Project Coordinator shall meet with EPA's Project Coordinator at least monthly via conference call, webinar, or in-person.

b. **Supervising Contractor.** Respondent's proposed Supervising Contractor must have sufficient technical expertise to supervise the Work and a quality assurance system

Commented [ES11]: EPA 12-26-19: clarifying edits

Commented [JK12]: If we have Madi Novak (DEQ) as the project manager, this text should come out.

Commented [ES13]: EPA 10-16-19: not appropriate at this time for ODEQ to take on the lead oversight role for this project area

that complies with ASQ/ANSI E4:2014, “Quality management systems for environmental information and technology programs - Requirements with guidance for use” (American Society for Quality, February 2014).

c. **Procedures for Disapproval/Notice to Proceed**

(1) Each Respondent shall designate, and notify EPA, within 10 days after the Effective Date, of the name(s), title(s), contact information, and qualifications of that Respondent’s proposed Project Coordinator and Supervising Contractor, whose qualifications shall be subject to EPA’s review for verification based on objective assessment criteria (*e.g.*, experience, capacity, technical expertise) and do not have a conflict of interest with respect to the project.

(2) EPA shall issue notices of disapproval and/or authorizations to proceed regarding each Respondent’s proposed Project Coordinator and Supervising Contractor, as applicable. If EPA issues a notice of disapproval to either Respondent, that Respondent shall, within 30 days, submit to EPA a list of supplemental proposed Project Coordinators and/or Supervising Contractors, as applicable, including a description of the qualifications of each. EPA shall issue a notice of disapproval or authorization to proceed regarding each supplemental proposed coordinator and/or contractor. Respondents may select any coordinator/contractor covered by an authorization to proceed and shall, within 21 days, notify EPA of Respondents’ selection.

(3) Either Respondent may change its Project Coordinator and/or Supervising Contractor, as applicable, by following the procedures of ¶¶ 14.c(1) and 14.c(2).

15. **Performance of Work in Accordance with SOWs.** Although Respondents are responsible for all Work required under this ASAO, each Respondent shall develop the RD in accordance with its respective SOW and all EPA-approved, conditionally-approved, or modified deliverables as required by the respective SOW. All deliverables required to be submitted for approval under the Settlement or SOW shall be subject to approval by EPA in accordance with ¶ 5.5 (Approval of Deliverables) of each respective SOW.

16. **Emergencies and Releases.** Each Respondent shall comply with the emergency and release response and reporting requirements required in ¶ 3.12 of its respective SOW. Subject to Section XVIII (Covenants by EPA), nothing in this Settlement, including ¶ 3.12 of the SOW, limits any authority of EPA: (a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the [River Mile 7 West Project AreaSite](#), or (b) to direct or order such action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the [River Mile 7 West Project AreaSite](#). If, due to a Respondent’s failure to take appropriate response action under ¶

3.12 of the SOW, EPA takes such action instead, that Respondent shall reimburse EPA under Section XIII (Payment of Response Costs) for all costs of the response action.

17. **Community Involvement.** If requested by EPA, Respondents shall conduct community involvement activities under EPA's oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of each respective SOW. Such activities may include, but are not limited to, designation of a Community Involvement Coordinator. Costs incurred by EPA under this Section constitute Future Response Costs to be reimbursed under Section XIII (Payment for Response Costs).

18. **Modification of SOW or Related Deliverables**

a. If EPA determines that it is necessary to modify the work specified in either or both SOWs and/or in deliverables developed under either or both SOWs in order to carry out the RD, then EPA may notify Respondents of the need for such modification. Any such modification must be in accordance with Section III (Statement of Purpose) and must be agreed to by EPA and Respondents. If either or both Respondents object to the modification, either or both Respondent may, within 30 days after EPA's notification, seek dispute resolution under Section XIV (Dispute Resolution).

b. The SOW or SOWs and/or related work plans shall be modified: (1) in accordance with the modification issued by EPA; or (2) if either or both Respondents invoke dispute resolution, in accordance with the final resolution of the dispute. The modification shall be incorporated into and enforceable under this Settlement, and Respondents shall implement all work required by such modification. Respondents shall incorporate the modification into the deliverable required under the respective SOW or both SOWs, as appropriate.

c. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Settlement . However, nothing in this Settlement shall be construed as requiring a Respondent under this . However, nothing in this Settlement shall be construed as requiring a Respondent under this Settlement to perform any work other than the Work provided under this Settlement or to reimburse any costs that do not constitute EPA Future Response Costs, ODEQ Response Costs or Tribal Response Costs.

19. **Notices and Submissions**

a. Respondents shall deliver a copy of this fully-executed Settlement to the Settling Funding Parties and their Trustee within 7 days of the Effective Date of this Settlement.

As to Settling Funding Parties:

State of Oregon

Jim McKenna
Natural Resources Policy Analyst
Office of Governor Kate Brown

1600 SW 4th Avenue, Suite 109
Portland, Oregon 97201
jim.j.mckenna@oregon.gov

Lynne Perry
Senior Assistant Attorney General
Natural Resources Section
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
lynne.perry@doj.state.or.us

City of Portland:

Annie Von Burg
Environmental Policy Manager
Bureau of Environmental Services
888 SW 5th Avenue, Suite 400
Portland, Oregon 97204
Annie.VonBurg@portlandoregon.gov

Nanci Klinger
Sr. Deputy City Attorney
Office of Portland City Attorney
1221 SW 4th Avenue
Portland, OR 97204
Nanci.Klinger@portlandoregon.gov

As to the Trustee:

[Daniel J. Silver](#)
[Trustee for Portland Harbor Remedial Design Trust](#)
[606 Columbia St. NW Suite 212](#)
[Olympia, WA 98501](#)
[danieljsilver@msn.com](#)

IX. PROPERTY REQUIREMENTS

20. **Agreements Regarding Access and Non-Interference.** Respondents shall, with respect to any Non-Settling Owner's Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by Respondents and the EPA, providing that such Non-Settling Owner, and Owner Respondent shall, with respect to the Affected Property: (i) provide EPA, DEQ, the Respondents, and their representatives, contractors, and

subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the Settlement, including those activities listed in ¶ 1920.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or that interferes with or adversely affects the implementation or integrity of the Work under this Settlement. Respondents shall provide a copy of such access and use restriction agreement(s) to EPA.

a. **Access Requirements.** The following is a list of activities for which access may be required regarding the Affected Property to implement the Work:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations regarding contamination at or near the River Mile 7 West Project Area;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, implementing, or monitoring response actions;
- (6) Assessing implementation of data management and institutional controls defined in the approved data management work plan and ICIAP as provided in the SOWs;
- (7) Implementing the Work pursuant to the conditions set forth in ¶ 64 (Work Takeover);
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondents or its agents, consistent with Section X (Access to Information);
- (9) Assessing Respondent's compliance with the Settlement;
- (10) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Settlement; and
- (11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions regarding the Affected Property.

21. **Best Efforts.** As used in this Section, "best efforts" means the efforts that a reasonable person in the position of Respondents would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access, as required by this Section. If Respondents isare unable to

accomplish what is required through “best efforts” in a timely manner, it shall notify EPA, and include a description of the steps taken to comply with the requirements. If EPA deems it appropriate, it may assist Respondents, or take independent action, in obtaining such access. All costs incurred by the United States in providing such assistance or taking such action, including the cost of attorney time ~~and the amount of monetary consideration or just compensation paid~~, constitute EPA Future Response Costs to be reimbursed under Section XIII (Payment of Response Costs).

22. If EPA determines in a decision document prepared in accordance with the NCP that institutional controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed, Respondents shall cooperate with EPA’s efforts to secure and ensure compliance with such institutional controls.

23. In the event of any Transfer of the Affected Property, unless EPA otherwise consents in writing, Respondents shall continue to comply with its obligations under the Settlement, including their obligation to secure access.

24. **Notice to Successors-in-Title.** Owner Respondent shall, prior to entering into a contract to Transfer its Affected Property, or 60 days prior to Transferring its Affected Property, whichever is earlier: (a) Notify the proposed transferee that EPA has determined that an RD must be performed at the [River Mile 7 West Project Area](#), that potentially responsible parties have entered into an Administrative Settlement Agreement and Order on Consent requiring implementation of such RD, (identifying the name, docket number, and the effective date of this Settlement); and (b) Notify EPA of the name and address of the proposed transferee and provide EPA with a copy of the above notice that it provided to the proposed transferee.

25. Notwithstanding any provision of the Settlement, EPA retains all of its access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions, including enforcement authorities related thereto under CERCLA, RCRA, and any other applicable statute or regulations.

X. ACCESS TO INFORMATION

26. Respondents shall provide to EPA, upon request, copies of all records, reports, documents and other information (including records, reports, documents and other information in electronic form) (hereinafter referred to as “Records”) within its possession or control or that of its contractors or agents relating to activities at the River Mile 7 West Project Area or to the implementation of this Settlement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

27. **Privileged and Protected Claims**

Commented [JK14]: Bayer attempted to reach agreement with the property owner in the River Mile 7 West Project Area, Siltronic, but those efforts were not successful. One of the reasons for attempting reach agreement was securing access. Request this be deleted as to the Siltronic property. Siltronic is a liable party and this likely would not be an issue if Siltronic would agree to be a performing party.

Commented [ES15]: EPA 10-16-19: deletion per call on 10-7

Commented [JK16]: This does not seem to be a provision that relates to implementation of remedial design and, therefore, suggest deleting.

Commented [ES17]: EPA 10-16-19: per discussion on 10-7, this language merely requires respondents to cooperate with EPA efforts; appropriate to leave in

a. Respondents may assert all or part of a Record requested by EPA is privileged or protected as provided under federal law, in lieu of providing the Record, provided Respondents complies with ¶ 27.b, and except as provided in ¶ 26.c.

b. If Respondents assert such a privilege or protection, it shall provide EPA with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Respondents shall provide the Record to EPA in redacted form to mask the privileged or protected portion only. Respondents shall retain all Records that it claims to be privileged or protected until EPA has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Respondent's favor.

c. Respondents may make no claim of privilege or protection regarding:

(1) any data regarding the River Mile 7 West Project Area, including, but not limited to, all such sampling, analytical, monitoring, hydrogeological, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the [River Mile 7 West Project Area](#); or (2) the portion of any Record that Respondents [are](#) required to create or generate pursuant to this Settlement.

28. **Business Confidential Claims.** Respondents may assert that all or part of a Record provided to EPA under this Section or Section XI (Record Retention) is business confidential to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Respondents shall segregate and clearly identify all Records or parts thereof submitted under this Settlement for which Respondents asserts business confidentiality claims. Records claimed as confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified Respondents that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to Respondent.

29. Notwithstanding any provision of this Settlement, EPA retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

XI. RECORD RETENTION

30. Until 10 years after completion of the Remedial Action, each Respondent shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in its possession or control or that come into its possession or control that relate in any manner to its [potential](#) liability under CERCLA with respect to the Site, provided, however, that a Respondent who is potentially liable as [an](#) owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each Respondent must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above, all non-identical copies of the last draft or final

version of any Records (including Records in electronic form) now in their possession or control or that come into its possession or control that relate in any manner to the performance of the Work, provided, however, that each Respondent (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

31. At the conclusion of the document retention period, each Respondent shall notify EPA at least 90 days prior to the destruction of any such Records and, upon request by EPA, and except as provided for in ¶ 26 (Privileged and Protected Claims), such Respondent shall deliver any such Records to EPA.

32. Each Respondent certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA and that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

XII. COMPLIANCE WITH OTHER LAWS

33. Nothing in this Settlement limits Respondents' obligations to comply with the requirements of all applicable federal and state laws and regulations. Respondents must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Settlement, if approved by EPA, shall be considered consistent with the NCP.

34. **Permits.** As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(c)(3) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e. within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal, state, or local permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

35. Respondents may seek relief under the provisions of Section XVI (Force Majeure) for any delay in performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval referenced in ¶ 33 (Permits) and required for the Work, provided that it has submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals. This Settlement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XIII. PAYMENT OF RESPONSE COSTS

36. **Payments by Respondents for EPA Future Response Costs.** Respondents shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bills.** On a periodic basis, EPA will send each Respondent a bill requiring payment that includes a SCORPIOS Report or similar EPA-prepared cost summary report, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and the United States Department of Justice in relation to that Respondent's individual SOW. Respondents shall make all payments within 30 days after Respondents' receipt of each bill requiring payment, except as otherwise provided in ¶ 37 (Contesting Future Response Costs).

b. **Payments.** Payments made pursuant to this Paragraph 35 shall be made by EFT in accordance with EFT instructions provided by EPA, or by submitting a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, the Site name, the EPA Region, the account number _____, and the EPA docket number for this action. Respondents shall send the check to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

Respondents shall use the following address for payments made by overnight mail:

U.S. Environmental Protection Agency
Government Lockbox 979076
1005 Convention Plaza
SL-MO-C2GL
St. Louis, MO 63101-1229

Commented [ES18]: EPA 12-26-19: updated address

c. **Notice.** At the time of payment, Respondents shall send notice that payment has been made to EPA to the Region 10 Project Coordinator and to the Servicing Finance Office, EPA Finance Center, MS-NWD, Cincinnati, OH 45268.

d. **Deposit of EPA Future Response Costs Payments.** The total amount to be paid by Respondents pursuant to ¶ 35.a (Periodic Bills) shall be deposited by EPA in the Portland Harbor Special Account to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund; provided, however, that EPA may deposit an EPA Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Portland Harbor Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit an EPA Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum.

37. **Interest.** In the event that any payment for EPA Future Response Costs is not made by the date required, Respondents shall pay Interest on the unpaid balance. The Interest on EPA Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Respondent's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the EPA by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVII (Stipulated Penalties).

38. **Contesting EPA Future Response Costs.** Respondents may initiate the procedures of Section XIV (Dispute Resolution) regarding payment of any EPA Future Response Costs billed under ¶ 35 (Payments for EPA Future Response Costs) if it determines that EPA has made a mathematical error or included a cost item that is not within the definition of EPA Future Response Costs, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. To initiate such dispute, Respondent shall submit a Notice of Dispute in writing to the EPA Project Coordinator within 30 days after receipt of the bill. Any such Notice of Dispute shall specifically identify the contested EPA Future Response Costs and the basis for objection. If Respondent submits a Notice of Dispute, Respondents shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested EPA Future Response Costs to EPA in the manner described in ¶ 35, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC) and remit to that escrow account funds equivalent to the amount of the contested EPA Future Response Costs. Respondents shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested EPA Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If EPA prevails in the dispute, within 5 days after the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in ¶ 35. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in ¶ 35. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse EPA for its EPA Future Response Costs.

39. **Payment of ODEQ Response Costs**

a. Each Respondent shall be responsible under this Settlement for reimbursing ODEQ Response Costs incurred pursuant to this Settlement that are not inconsistent with the NCP under the terms of separate agreements to be executed by each Respondent and ODEQ ("ODEQ Agreements"). Subject to the terms of the ODEQ Agreements, ODEQ will submit detailed accountings to each Respondent's Project Coordinator on a monthly basis of all ODEQ Response Costs sought for reimbursement under the ODEQ Agreement. Subject to the terms of the ODEQ Agreements, ODEQ invoices will include a summary of costs billed to date and all underlying documentation including but not limited to: ODEQ personnel time sheets;

travel authorizations and vouchers; ODEQ contractor monthly invoices; and all applicable laboratory invoices.

b. Disputes regarding ODEQ Response Cost bills shall be resolved in accordance with a process agreed to between ODEQ and each Respondent under the ODEQ Agreements, and neither ruled by nor conducted under the dispute resolution provisions of this Settlement.

c. Nothing in this Paragraph shall be construed to limit ODEQ's authority under any source other than this Settlement to seek funding from Respondents or any other party of any costs that ODEQ may incur or may have incurred.

40. Payment of Tribal Response Costs

a. Following the issuance of this Settlement, Respondents shall pay the Tribal Governments, in advance, for Tribal Response Costs incurred pursuant to this Settlement. Respondents shall pay all Tribal Response Costs associated with this Settlement that are not inconsistent with the NCP and as agreed to by the Tribal Governments and Respondents under the terms of separate agreements to be executed by each Respondent and the Tribal Governments ("Tribal Agreements"). The Tribal Governments shall provide supporting documentation to each Respondent for all Tribal Response Costs paid in advance by such Respondent, including but not limited to, a detailed accounting, Tribal Government personnel time sheets, travel authorizations and vouchers, Tribal Government contractor monthly invoices; and all applicable laboratory invoices.

Commented [JK19]: I suggest deleting. I do not see a reason to pay in advance.

Commented [ES20]: EPA 10-16-19: let's discuss on call tomorrow

Commented [JK21]: Same comment.

Commented [A22]: 7-22-19 EPA – same comment as above

b. Disputes regarding Tribal Response Cost bills shall be resolved in accordance with a process in the Tribal Agreements, and neither ruled by nor conducted under the dispute resolution provisions of this Settlement.

c. Nothing in this section shall in any way be construed to limit the rights of the Tribal Governments to seek to recover response costs incurred by the Tribal Governments related to this Settlement and disputed by Respondents, or for natural resource damages as defined by 42 U.S.C. § 9607(a)(4)(C).

XIV. DISBURSEMENT OF SPECIAL ACCOUNT FUNDS

41. **Creation of ~~Arkema and Bayer CropScience Project Area~~ Disbursement Special Accounts and Agreement to Disburse Funds to Respondents.** Within 30 days after the Effective Date and the receipt of funds from Settling Funding parties into the RD Special Account, EPA shall: (a) establish the ~~Arkema Project Area~~ Disbursement Special Account and transfer \$_____ from the RD Special Account to the ~~Arkema Project Area~~ Disbursement Special Account, and (b) establish the ~~Bayer CropScience Project Area~~ Disbursement Special

Commented [NJ23]: IN 12/27: now that I have broken out the eligible acres in the Arkema and Bayer SOWs in the definitions section, it is better to reference that than to use an unexplained percentage.

¹ This amount is calculated by multiplying \$40,000 by ~~1—%~~ of the Eligible Acres in the Arkema SOW, as defined in this Settlement.

Account and transfer \$ ² from the RD Special Account to the ~~{Bayer CropScience Project Area}~~ Disbursement Special Account. Such funds will then be available for Phase 1 Disbursement as provided in this Section. Funds for Phase 2 Disbursement will only be eligible for disbursement upon amendment of this Settlement as provided in this Section. Subject to the terms and conditions set forth in this Section, EPA agrees to make the funds in the ~~{Arkema and Bayer CropScience Project Area}~~ Disbursement Special Accounts, including Interest Earned on the funds in the ~~{Arkema and Bayer CropScience Project Area}~~ Disbursement Special Accounts, available for disbursement to Respondents as partial reimbursement for performance of the Work. EPA shall disburse funds from the ~~{Arkema and Bayer CropScience Project Area}~~ Disbursement Special Accounts to Respondents in accordance with the procedures and milestones for phased disbursement set forth in this Section.

42. **Timing, Amount, and Method of Phase 1 Disbursements From the ~~Arkema and Bayer CropScience~~ Disbursement Special Accounts.** Within 30 days after EPA's receipt of a Cost Summary and Certification, as defined by ¶ **Error! Reference source not found.**, or if EPA has requested additional information under ¶ **Error! Reference source not found.** or a revised Cost Summary and Certification under ¶ 43.c, within 30 days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, EPA shall disburse the funds from the ~~Arkema and Bayer CropScience~~ Disbursement Special Accounts at the completion of the following milestone, and in the amount set forth below:

Milestone	Disbursement of Funds
EPA approval of Basis of Design Report <u>submitted pursuant to Arkema SOW</u>	\$ ³ from the {Arkema Project Area} Disbursement Special Account
EPA approval of Basis of Design Report <u>submitted pursuant to Bayer CropScience SOW</u>	\$ ⁴ from the {Bayer CropScience Project Area} Disbursement Special Account

EPA shall disburse the funds for the Phase 1 Disbursement from the ~~{Arkema and Bayer CropScience Project Area}~~ Disbursement Special Accounts to Respondents in the following manner:

[Insert name and address for payment or instructions for electronic funds transfer.]

Timing, Amount, and Method of Phase 2 Disbursements From the ~~{Project Area}Arkema and Bayer CropScience~~ Disbursement Special Accounts. Within 30 days after EPA's receipt of a Cost Summary and Certification, as defined by ¶ **Error! Reference source not found.**, or if

² This amount is calculated by multiplying \$40,000 by ~~{— %}~~ of the Eligible Acres in the Bayer CropScience SOW, as defined in this Settlement.

³ This amount is calculated by multiplying \$40,000 by ~~{— %}~~ of the Eligible Acres in the Arkema SOW, as defined in this Settlement.

⁴ This amount is calculated by multiplying \$40,000 by ~~{— %}~~ of the Eligible Acres in the Bayer CropScience SOW, as defined in this Settlement.

EPA has requested additional information under ¶ **Error! Reference source not found.** or a revised Cost Summary and Certification under ¶ 43.c, within 30 days after receipt of the additional information or revised Cost Summary and Certification, and subject to the conditions set forth in this Section, Respondents shall be eligible to request an amendment of this Settlement to provide for Phase 2 Disbursement in relation to Work conducted pursuant to the Arkema SOW or Work conducted pursuant to the Bayer CropScience SOW. The amendment will replace the current text of this Paragraph 42 with the text in Appendix C. EPA will agree to such an amendment if: (1) EPA has issued the Notice of Work Completion in relation to Work conducted pursuant to the Arkema SOW or the Bayer CropScience SOW, and (2) EPA has sufficient funding in the respective Arkema and Bayer CropScience Disbursement Special Accounts to provide for the calculated amount of the Phase 2 Disbursement.⁵ EPA will transfer funds from the RD Special Account and/or request such funding pursuant to the Settlement Agreement for Funding Remedial Design. Any amendment under this paragraph will be for the sole purpose of memorializing and facilitating the Phase 2 Disbursement.

EPA's obligation to provide for Phase 2 Disbursement under an amendment to this Settlement Agreement shall be limited to funds available in the respective Arkema and Bayer CropScience Disbursement Special Accounts at the time the amendment is finalized. Nothing in this agreement shall be interpreted to require EPA to obligate funds in excess of amounts available in violation of the Antideficiency Act, 31 U.S.C. § 1341, or construed as implying that Congress will, at a later date, appropriate any funds sufficient to meet any deficiency.

Reimbursement for Disbursement Phase 2 will only be provided for claims made on or before December 31, 2027.

⁵ This amount is calculated by multiplying \$40,000 by the Eligible Acres as defined in this Settlement.

EPA shall disburse the funds for the Phase 2 Disbursement from the Arkema and Bayer CropScience Disbursement Special Accounts to Respondents in the following manner:

EPA shall disburse the funds for the Phase 2 Disbursement from the Arkema and Bayer CropScience Disbursement Special Accounts to Respondents in the following manner:

[Insert name and address for payment or instructions for electronic funds transfer.]

44.43. Requests for Disbursement of Special Account Funds

a. Within 30 days after issuance of EPA's written confirmation that a milestone of the Work, as defined in ¶¶ 42 and 0 (Timing, Amount, and Method of Disbursing Funds for Phases 1 and 2), has been satisfactorily completed, each Respondent shall submit to EPA a Cost Summary and Certification, as defined in ¶ **Error! Reference source not found.**, covering the Work performed up to the date of completion of that milestone. Respondents shall not include in any submission costs included in a previous Cost Summary and Certification following completion of an earlier milestone of the Work if those costs have been previously sought or reimbursed pursuant to ¶¶ 42 and 0.

b. Each Cost Summary and Certification shall include a complete and accurate written cost summary and certification of the necessary costs incurred and paid by Respondents for the Work covered by the particular submission, excluding costs not eligible for disbursement under ¶ 44 (Costs Excluded from Disbursement). Each Cost Summary and Certification shall contain the following statement signed by the Chief Financial Officer of a Respondent or Independent Certified Public Accountant :

To the best of my knowledge, after thorough investigation and review of Respondents' documentation of costs incurred and paid for Work performed pursuant to this Settlement **[insert, as appropriate:** "up to the date of completion of milestone 1," "between the date of completion of milestone 1 and the date of completion of milestone 2,"] I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment.

The Chief Financial Officer of a Respondent or Independent Certified Public Accountant shall also provide EPA a list of the documents that he or she reviewed in support of the Cost Summary and Certification. Upon request by EPA, Respondents shall submit to EPA any additional information that EPA deems necessary for its review and approval of a Cost Summary and Certification.

c. If EPA finds that a Cost Summary and Certification includes a mathematical error, costs excluded under ¶ 44 (Costs Excluded from Disbursement), costs that are inadequately documented, or costs submitted in a prior Cost Summary and Certification, it

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will notify ~~the Respondents~~ Respondent submitting such Cost Summary and Certification and provide ~~them~~ that Respondent an opportunity to cure the deficiency by submitting a revised Cost Summary and Certification. If Respondent fails to cure the deficiency within 30 days after being notified of, and given the opportunity to cure, the deficiency, EPA will recalculate ~~that~~ Respondent's costs eligible for disbursement for that submission and disburse the corrected amount to Respondents in accordance with the procedures in ¶ 42 (Timing, Amount, and Method of Disbursing Funds of Phases 1 and 2 Disbursement). Respondents may dispute EPA's recalculation under this Paragraph pursuant to Section XIV (Dispute Resolution). In no event shall Respondents be disbursed funds from the ~~Arkema or Bayer CropScience Project Area~~ Disbursement Special Accounts in excess of amounts properly documented in a Cost Summary and Certification accepted or modified by EPA.

45.44. Costs Excluded from Disbursement. The following costs are excluded from, and shall not be sought by Respondents for, disbursement from the ~~Arkema and Bayer CropScience~~ Disbursement Special Accounts: (a) response costs paid pursuant to Section XIII (Payments of Response Costs); (b) any other payments made by Respondents to the United States pursuant to this Settlement, including, but not limited to, any Interest or stipulated penalties paid pursuant to Section XIII (Payments for Response Costs) or XVII (Stipulated Penalties); (c) attorneys' fees and ~~related~~ costs; (d) costs of any response activities Respondents perform that are not required under, or approved by EPA pursuant to, this Settlement; (e) costs related to Respondents' litigation, settlement, development of potential contribution claims, or identification of defendants; (f) internal costs of Respondents, including but not limited to, salaries, travel, or in-kind services, except for those costs that represent the work of employees of Respondents directly performing the Work; (g) any costs incurred by Respondents prior to the Effective Date except for approved Work completed pursuant to this Settlement; or (h) any costs incurred by Respondents pursuant to Section XIV (Dispute Resolution).

46.45. Termination of Disbursements from the Special Accounts. EPA's obligation to disburse funds from the ~~Arkema or Bayer CropScience~~ Disbursement Special Accounts under this Settlement shall terminate upon EPA's determination that a Respondent: (a) ~~has~~ knowingly submitted a materially false or misleading Cost Summary and Certification; (b) ~~has~~ submitted a materially inaccurate or incomplete Cost Summary and Certification, and ~~has~~ failed to correct the materially inaccurate or incomplete Cost Summary and Certification within 30 days after being notified of, and given the opportunity to cure, the deficiency; or (c) failed to submit a Cost Summary and Certification as required by ¶ 43 (Requests for Disbursement of Special Account Funds) within 30 days (or such longer period as EPA agrees) after being notified that EPA intends to terminate its obligation to make disbursements pursuant to this Section because of Respondents' failure to submit the Cost Summary and Certification as required by ¶ 43. EPA's obligation to disburse funds from the ~~Arkema and Bayer CropScience~~ Disbursement Special Accounts shall also terminate upon EPA's assumption of performance of any portion of the Work pursuant to ¶ 72 (Work Takeover), when such assumption of performance of the Work is not challenged by Respondents or, if challenged, is upheld under Section XIV (Dispute Resolution). Respondents may dispute EPA's termination of special account disbursements under Section **Error! Not a valid bookmark self-reference.**XIV.

47.46. Recapture of Special Account Disbursements. Upon termination of disbursements from the ~~Arkema or Bayer CropScience Project Area~~ Disbursement Special

Accounts under Paragraph 46 (Termination of Disbursements from the Special Account), if EPA has previously disbursed funds from the ~~{Arkema or Bayer CropScience Project Area}~~ Disbursement Special Accounts for activities specifically related to the reason for termination, e.g., discovery of a materially false or misleading submission after disbursement of funds based on that submission, EPA shall submit a bill ~~to Respondents~~ for those amounts already disbursed from the ~~{Arkema or Bayer CropScience Project Area}~~ Disbursement Special Accounts specifically related to the reason for termination, plus Interest on that amount covering the period from the date of disbursement of the funds by EPA to the date of repayment of the funds ~~by Respondents~~. Within 30 days after receipt of EPA's bill, Respondents shall reimburse the EPA Hazardous Substance Superfund for the total amount billed. Payment shall be made in accordance with ¶ **Error! Reference source not found.** (Payments). Upon receipt of payment, EPA may deposit all or any portion thereof in the ~~{Arkema or Bayer CropScience Project Area}~~ Disbursement Special Accounts, the RD Special Account, the Portland Harbor Special Account, or the EPA Hazardous Substance Superfund. The determination of where to deposit or how to use the funds shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum. Respondents may dispute EPA's determination as to recapture of funds pursuant to Section XIV (Dispute Resolution).

48.47. Balance of Special Account Funds. After EPA completes all disbursement to Respondents in accordance with this Section, if any funds remain in the ~~Arkema and Bayer CropScience~~ Disbursement Special Accounts, EPA will transfer such funds to the RD Special Account for use by the EPA for RD work at or in connection with the Site. If EPA determines such funds are no longer needed for RD work at or in connection with the Site, EPA may transfer such funds to the RD Special Account, the Portland Harbor Special Account, or to the EPA Hazardous Substance Superfund. Any transfer of funds to the RD Special Account, the Portland Harbor Special Account, or the EPA Hazardous Substance Superfund shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum.

XV. DISPUTE RESOLUTION

49.48. Unless otherwise expressly provided for in this Settlement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement. The Parties shall attempt to resolve any disagreements concerning this Settlement expeditiously and informally.

50.49. Informal Dispute Resolution. If either Respondent objects to any EPA action taken pursuant to this Settlement, including billings for EPA Future Response Costs, such Respondent shall send EPA a written Notice of Dispute describing the objection(s) within 30 days after such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have 30 days from EPA's receipt of Respondent's Notice of Dispute to resolve the dispute through informal negotiations (the Negotiation Period). The Negotiation Period may be extended at the sole discretion of EPA. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement.

51.50. Formal Dispute Resolution. If the Parties are unable to reach an agreement within the Negotiation Period, Respondent shall, within 20 days after the end of the Negotiation Period, submit a statement of position to EPA, which may include a request for an in-person or telephonic meeting with the Regional Administrator and a request for CSTAG review.

EPA

may, within 20 days thereafter, submit a statement of position. Thereafter, the Regional Administrator, EPA Region 10 or his/her designee will issue a written decision on the dispute to Respondents; provided, however, that if Respondent included a request to meet with the Regional Administrator and/or CSTAG with its statement of position, no written decision may be issued until such meeting has occurred. EPA's decision shall be incorporated into and become an enforceable part of this Settlement. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

52.51. The invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of Respondents under this Settlement not affected by the disputed issues, except as provided by ¶ 37 (Contesting EPA Future Response Costs), as agreed by EPA.

53.52. Except as provided in ¶ 62, stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Settlement. In the event that Respondents do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVII (Stipulated Penalties).

XVI. FORCE MAJEURE

54.53. "Force Majeure" for purposes of this Settlement is defined as any event arising from causes beyond the control of Respondents, of any entity controlled by Respondents, or of Respondents' contractors that delays or prevents the performance of any obligation under this Settlement despite Respondents' best efforts to fulfill the obligation. The requirement that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work or increased cost of performance.

55.54. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement for which Respondents intend or may intend to assert a claim of force majeure, Respondents shall notify the EPA Project Coordinator orally or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund and Emergency Management Division, EPA Region 10, within 24 hours of when Respondents first knew-realizes that the event might cause a delay. Within 10 days thereafter, Respondents shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the

delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Respondents shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Respondents from asserting any claim of force majeure regarding that event; provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under ¶ 45 and whether Respondents has exercised its best efforts under ¶ 45, EPA may, in its unreviewable discretion, excuse in writing Respondent's failure to submit timely or complete notices under this Paragraph.

~~56.55.~~ If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Settlement that are affected by the force majeure will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

~~57.56.~~ If Respondents elect to invoke the dispute resolution procedures set forth in Section XIV (Dispute Resolution), Respondents shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of ¶¶ 45 and 46. If Respondents carry this burden, the delay at issue shall be deemed not to be a violation by Respondents of the affected obligation of this Settlement identified to EPA.

~~58.57.~~ The failure by EPA to timely complete any obligation under the Settlement is not a violation of the Settlement, provided, however, that if such failure prevents Respondents from meeting one or more deadlines under the Settlement, Respondents may seek relief under this Section.

XVII. STIPULATED PENALTIES

~~59.58.~~ Each Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in ¶¶ 51.a and 52 for its individual failure to comply with the obligations specified in ¶¶ 51.a.(4) and 52 under ~~their~~ its SOW, unless excused under Section XVI (Force Majeure). Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in ¶¶ 51.a. and 52 for obligations listed in ¶ 51.a. (1-3) and any other requirement of this ~~Settlement~~ ASAOC. "Comply" as

used in the previous sentence includes compliance by Respondent with all applicable requirements of this Settlement, within the deadlines established under this Settlement. If: (i) an initially submitted or resubmitted deliverable contains a material defect and the conditions are met for modifying the deliverable under ¶ 5.5(a)(2) of each ~~of their~~ SOWs; or (ii) a resubmitted deliverable contains a material defect; then the material defect constitutes a lack of compliance for purposes of this Paragraph.

60.59. Stipulated Penalty Amounts: Payments, Financial Assurance, Major Deliverables, and Other Milestones.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with any obligation identified in ¶ 51.b:

Penalty Per Violation Per Day	Period of Noncompliance
\$ 500	1st through 7th day
\$ 1,000	8th through 14th day
\$ 2,500	15th through 30th day
\$ 5,000	31st day and beyond

b. **Obligations**

(1) Payment of any amount due under Section XIII (Payment of Response Costs).

(2) Establishment and maintenance of financial assurance in accordance with Section XXIV (Financial Assurance).

(3) Establishment of an escrow account to hold any disputed Future Response Costs under ¶ 37 (Contesting EPA Future Response Costs).

(4) Submission of timely and quality deliverables for tasks 1a, 1b, 2a, 2b, 3a, 3b, 4a, 4b, 5a, 5b, 6a, 6b, 7a, 7b, 8a, 8b, 9a, 9b, 10, 11, 12, 13, and 14 listed under ¶ 6.2 of the respective SOWs.

61.60. Stipulated Penalty Amounts: Other Deliverables. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables required by this Settlement, other than those specified in ¶ 59.b:

Penalty Per Violation Per Day	Period of Noncompliance
\$ 250	1st through 7th day

\$ 500	8th through 14th day
\$ 1,000	15th through 30th day
\$ 2,500	31st day and beyond

~~62.61.~~ In the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 64 (Work Takeover), Respondents shall be liable for a stipulated penalty in the amount of \$75,000 or 25% of the cost of the Work EPA performs, whichever is less. Stipulated penalties under this Paragraph are in addition to the remedies available to EPA under ¶¶ 64 (Work Takeover) and 86 (Access to Financial Assurance).

~~63.62.~~ All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Penalties shall continue to accrue during any dispute resolution period and shall be paid within 15 days after the agreement or the receipt of EPA's decision. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under ¶ 5.5 (Approval of Deliverables) of the SOW, during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and (b) with respect to a decision by the Regional Administrator, EPA Region 10 or his/her designee under Section XIV (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the Regional Administrator or designee issues a final decision regarding such dispute. Nothing in this Settlement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement.

~~64.63.~~ Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

~~65.64.~~ All penalties accruing under this Section shall be due and payable to EPA within 30 days after one or both Respondents' receipt from EPA of a demand for payment of the penalties, unless Dispute Resolution is invoked under Section XIV (Dispute Resolution) within the 30-day period. All payments to EPA under this Section shall indicate that the payment is for stipulated penalties and shall be made in accordance with ¶ 35 (Payments by Respondents for EPA Future Response Costs).

~~66.65.~~ If stipulated penalties are not paid when due, one or both Respondents shall pay Interest on the unpaid stipulated penalties as follows: (a) if Respondent has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to ¶ 54 until the date of payment; and (b) if Respondent fails to timely invoke dispute resolution, Interest shall accrue from the date of demand under ¶ 56 until the date of payment. If

Respondent fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

67.66. The payment of penalties and Interest, if any, shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement.

68.67. Nothing in this Settlement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Settlement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3); provided, however, that EPA shall not seek civil penalties pursuant to Section 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided in this Settlement, except in the case of a willful violation of this Settlement or in the event that EPA assumes performance of a portion or all of the Work pursuant to ¶ 64 (Work Takeover).

69.68. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement.

XVIII. COVENANTS BY EPA

70.69. **Covenants for Respondents by EPA.** Except as provided in Section XIX (Reservation of Rights by EPA), EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work performed and Future Response Costs paid. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Respondents of their obligations under this Settlement. These covenants extend only to Respondents and do not extend to any other person.

XIX. RESERVATIONS OF RIGHTS BY EPA

71.70. Except as specifically provided in this Settlement, nothing in this Settlement shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste on, at, or from the Site. Further, except as specifically provided in this Settlement, nothing in this Settlement shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

72.71. The covenants set forth in Section XVIII (Covenants by EPA) above do not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- Settlement;
- a. liability for failure by Respondents to meet a requirement of this
- Response Costs;
- b. liability for costs not included within the definition of EPA Future
 - c. liability for performance of response action other than the Work;
 - d. criminal liability;
 - e. liability for violations of federal or state law that occur during or after implementation of the Work;
 - f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
 - g. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
 - h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site not paid as EPA Future Response Costs under this Settlement.

73.72. SOW Work Takeover

a. In the event EPA determines that a Respondent: (1) has ceased implementation of any portion of its SOW (2) is seriously or repeatedly deficient or late in its performance of its SOW; or (3) is implementing its SOW in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice (Work Takeover Notice) to that Respondent, with a copy of such notice simultaneously provided to the other Respondent. Any Work Takeover Notices issued by EPA (which writing may be electronic) will specify the grounds upon which such notice was issued and will provide that Respondent a period of 10 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 10-day notice period specified in ¶ 64.a that Respondent has not remedied to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter direct the other Respondent to assume performance of all or any portion(s) of the relevant SOW as EPA deems necessary. In the event that the other Respondent fails to assume performance of such work within a reasonable time, then the EPA may assume performance of such work (SOW Work Takeover). EPA will notify both Respondent in writing (which writing may be electronic) if EPA determines that implementation of a SOW Work Takeover is warranted under this ¶ 72.b. Funding of SOW Work Takeover costs by EPA is addressed under ¶ 86 (Access to Financial Assurance).

c. Respondents may invoke the procedures set forth in ¶ 42 (Formal Dispute Resolution) to dispute EPA's implementation of a SOW Work Takeover under ¶ 64.b. However, notwithstanding Respondents' invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under ¶ 64.b until the earlier of (1) the date that Respondents remedy, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, or (2) the date that a written decision terminating such Work Takeover is rendered in accordance with ¶ 42 (Formal Dispute Resolution).

d. Notwithstanding any other provision of this Settlement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XX. COVENANTS BY RESPONDENTS

74.73. Covenants by Respondents.

a. Except as provided in ¶ 65.b, Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Respondents' Future Response Costs, and this Settlement, including, but not limited to:

(1) any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

(2) any claim under Sections 107 and 113 of CERCLA, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Work, Future Response Costs, and this Settlement; or

(3) any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Oregon Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law.

b. This Settlement shall not have any effect on claims or causes of action that any Respondent has or may have pursuant to Sections 107(a) or 113(f) of CERCLA, 42 U.S.C. §§ 9607(a) or 9613(f), against the United States on behalf of various federal agencies, based upon a claim that the United States is a potentially responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), relating to the Work or EPA Response Costs paid under Section XIII of this Settlement. However, the United States acknowledges the reservation of Section 107 claims without any concession that, even if such a claim exists, it is cognizable under Section 107.

~~75.74.~~ These covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section XIX (Reservations of Rights by EPA), other than in ¶ 71.a (liability for failure to meet a requirement

of the Settlement), 71.d (criminal liability), or 71.e (violations of federal/state law during or after implementation of the Work), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

76.75. Nothing in this Settlement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

77.76. Respondents reserve, and this Settlement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Respondent's deliverables or activities.

78.77. Covenants by Performing Parties to Settling Funding Parties. Subject to Performing Parties' receipt of the funds from Settling Funding Parties as contemplated by the Settlement Agreement for Funding Remedial Design. Performing Parties covenant not to sue and agree not to assert any claims or causes of action in any forum, judicial or otherwise, against the Settling Funding Parties, or their contractors or employees, with respect to the work under this Settlement or the RD Payments provided under the Settlement Agreement for Funding Remedial Design. For purposes of this paragraph "work" shall mean all activities and obligations Performing Parties are required to perform under this Settlement, except those required by Section XI (Record Retention). Performing Parties agree that Settling Funding Parties have the right to enforce this covenant.

XXI. OTHER CLAIMS

79.78. By issuance of this Settlement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement.

80.79. Except as expressly provided in Section XIX (Covenants by Respondents) and Section XVIII (Covenants by EPA), nothing in this Settlement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Settlement for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages, and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

Commented [JK27]: This is too broad. It goes beyond remedial design. If is intended to address EPA's approval of the remedial design documents that Bayer and Arkema prepare, that is covered by approval of deliverables.

Commented [ES28]: EPA 10-16-19: this language should remain; refers to respondents seeking money damages due to negligence in selection of the remedy or approving work under the order

Commented [A29]: EPA 12-26-19: language added per amendment to RD Funding Agmt signed on 11-9-19

Commented [MS30R29]: Can you provide a copy of that amendment?

~~81.80.~~ No action or decision by EPA pursuant to this Settlement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXII. EFFECT OF SETTLEMENT/CONTRIBUTION

~~82.81.~~ Nothing in this Settlement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement, other than the Settling Funding Parties as provided in Paragraph 78 (Covenants by Performing Parties to Settling Funding Parties) of this Settlement. Except as provided in Section XIX (Covenants by Respondents), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

~~83.82.~~ The Parties agree that this Settlement constitutes an administrative settlement pursuant to which Respondents have, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement are the Work and Future Response Costs. Notwithstanding the foregoing, Respondents agree that the protections provided by this ¶ 73 do not have any effect on claims or causes of action that they have or may have against one another in relation to the “matters addressed” in this Settlement.

~~84.83.~~ The Parties further agree that this Settlement constitutes an administrative settlement pursuant to which each Respondent has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

~~85.84.~~ Respondents shall, with respect to any suit or claim brought by it for matters related to this Settlement, notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Respondents also shall, with respect to any suit or claim brought against it for matters related to this Settlement, notify EPA in writing within 10 days after service of the complaint or claim upon it. In addition, Respondents shall notify EPA within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement.

~~86.85.~~ In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the

subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant by EPA set forth in Section XVIII (Covenants by EPA).

XXIII. INDEMNIFICATION

~~87.86.~~ The United States does not assume any liability by entering into this Settlement or by virtue of any designation of Respondents as EPA's authorized representative under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and 40 C.F.R. § 300.400(d)(3). Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, employees, contractors, subcontractors, employees, and representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, its officers, directors, employees, agents, contractors, or subcontractors, and any persons acting on Respondent's behalf or under its control, in carrying out activities pursuant to this Settlement. Further, Respondents agrees to pay the United States all costs it incurs, including, but not limited to attorneys' fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Settlement. The United States shall not be held out as a party to any contract entered into, by, or on behalf of Respondents in carrying out activities pursuant to this Settlement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

~~88.87.~~ The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

~~89.88.~~ Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States for damages or reimbursement or for set-off of any payments made, or to be made, to the United States, arising from or on account of any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the [River Mile 7 West Project Area](#), including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of, any contract, agreement, or arrangement between Respondents and any person for performance of Work on or relating to the River Mile 7 West Project Area, including, but not limited to, claims on account of construction delays.

XXIV. INSURANCE

~~90.89.~~ No later than 15 days before commencing any on-site Work, each Respondent shall secure, and shall maintain until so notified by EPA, commercial general liability insurance with limits of liability of \$1 million per occurrence, and automobile insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming EPA as an additional insured with respect to all liability arising out of the activities

performed by or on behalf of such Respondent pursuant to this Settlement. In addition, for the duration of the Settlement, each Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement, each Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Settlement. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in a lesser amount, Respondents need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Respondents shall ensure that all submittals to EPA under this Paragraph identify the Site name, City, State and the EPA docket number for this action.

XXV. FINANCIAL ASSURANCE

91.90. In order to ensure the completion of the Work, Arkema Inc. shall secure financial assurance, initially in the amount of \$[] and Bayer CropScience, Inc. shall secure financial assurance, initially in the amount of \$[] (each an "Estimated Cost of the Work"), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Respondent may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. a trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency;

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdiction(s) and whose insurance operations are regulated and examined by a federal or state agency;

e. A demonstration by a Respondent that it meets the financial test criteria of ¶ 92, accompanied by a standby funding commitment, which obligates the affected Respondent to pay funds to or at the direction of EPA, up to the amount financially assured through the use of this demonstration in the event of a Work Takeover; or

Commented [A31]: ARKEMA COMMENT: The idea here is that each Respondent's financial assurance will be tied to the value of the work required under that Respondent's SOW.

Commented [A32]: 7-22-19 EPA – as respondents jointly and severally liable for all work, important to have both respondents liable for entire amount of FA although EPA okay with each respondent providing a portion of FA

f. A guarantee to fund or perform the Work executed in favor of EPA by a company: (1) that is a direct or indirect parent company of a Respondent or has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with a Respondent; and (2) can demonstrate to EPA’s satisfaction that it meets the financial test criteria of ¶ 92.

92.91. Respondent shall, within 30 days of the Effective Date, obtain EPA’s approval of the form of Respondents’ financial assurance. Within 30 days of such approval, Respondent shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the EPA Region 10, Office of Regional Counsel, 1200 Sixth Avenue, Seattle, WA 98101.

93.92. Respondents seeking to provide financial assurance by means of a demonstration or guarantee under ¶ 90.e or 90.f, must, within 30 days of the Effective Date:

a. Demonstrate that:

(1) The affected Respondent or guarantor has:

- i. Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and
- ii. Net working capital and tangible net worth each at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and
- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; or

(2) The affected Respondent or guarantor has:

- i. A current rating for its senior unsecured debt of AAA, AA, A, or BBB as issued by Standard and Poor’s or Aaa, Aa, A or Baa as issued by Moody’s; and
- ii. Tangible net worth at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of

other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and

- iii. Tangible net worth of at least \$10 million; and
- iv. Assets located in the United States amounting to at least 90 percent of total assets or at least six times the sum of the Estimated Cost of the Work and the amounts, if any, of other federal, state, or tribal environmental obligations financially assured through the use of a financial test or guarantee; and

b. Submit to EPA for the affected Respondent or guarantor: (1) a copy of an independent certified public accountant's report of the entity's financial statements for the latest completed fiscal year, which must not express an adverse opinion or disclaimer of opinion; and (2) a letter from its chief financial officer and a report from an independent certified public accountant substantially identical to the sample letter and reports available from EPA or under the "Financial Assurance - Settlements" subject list category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>.

94.93. Respondents providing financial assurance by means of a demonstration or guarantee under ¶ 90.e or 90.f must also:

a. Annually resubmit the documents described in ¶ 92.b within 90 days after the close of the affected Respondent's or guarantor's fiscal year;

b. Notify EPA within 30 days after the affected Respondent or guarantor determines that it no longer satisfies the relevant financial test criteria and requirements set forth in this Section; and

c. Provide to EPA, within 30 days of EPA's request, reports of the financial condition of the affected Respondent or guarantor in addition to those specified in ¶ 83.b; EPA may make such a request at any time based on a belief that the affected Respondent or guarantor may no longer meet the financial test requirements of this Section.

95.94. Respondents shall diligently monitor the adequacy of the financial assurance. If Respondents becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, Respondents shall notify EPA of such information within 7 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the Respondents of such determination. Respondent shall, within 30 days after notifying EPA or receiving notice from EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the Respondents, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance

mechanism, not to exceed 60 days. Respondents shall follow the procedures of ¶ 86 (Modification of Amount, Form, or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Respondent's inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

96.95. Access to Financial Assurance

a. If EPA issues a notice of implementation of a Work Takeover under ¶ 72.b, then, in accordance with any applicable financial assurance mechanism and/or related standby funding commitment, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with ¶ 86.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel such mechanism, and the Respondents fail to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with ¶ 86.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under ¶ 72.b, either: (1) EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism and/or related standby funding commitment, whether in cash or in kind, to continue and complete the Work; or (2) the financial assurance is a demonstration or guarantee under ¶ 90.e or 90.f, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Respondents shall, within 30 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this ¶ 86 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Portland Harbor Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this ¶ 86 must be reimbursed as EPA Future Response Costs under Section XIII (Payments for Response Costs).

97.96. Modification of Amount, Form, or Terms of Financial Assurance.

Respondents may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial assurance mechanism. Any such request must be submitted to EPA in accordance with ¶ 82, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the

financial assurance. EPA will notify Respondents of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Respondents may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement or written decision resolving such dispute under Section XIV (Dispute Resolution). Respondents may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, Respondents shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with ¶ 91.

98.97. Release, Cancellation, or Discontinuation of Financial Assurance.

Respondents may release, cancel, or discontinue any financial assurance provided under this Section only: (a) in accordance with EPA's approval of such release, cancellation, or discontinuation; or (b) if there is a dispute regarding the release, cancellation, or discontinuance of any financial assurance, in accordance with the agreement or final decision resolving such dispute under Section XIV (Dispute Resolution), or (c) upon receipt of Notice of Work Completion.

XXVI. INTEGRATION/APPENDICES

99.98. This Settlement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement. The following appendices are attached to and incorporated into this Settlement:

- a. Appendix A1 is the Arkema SOW.
- b. Appendix A2 is the Bayer CropScience SOW.
- c. Appendix B is a map of the RD River Mile 7 West Project Area
- c.d. Appendix C is Phase 2 Disbursement Amendment language

XXVII. MODIFICATION

100.99. The EPA Project Coordinator may, subject to Paragraph 18, modify any plan, schedule, or SOW in writing or by oral direction, provided such modification relates to Remedial Design in the River Mile 7 West Project Area. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the EPA Project Coordinator's oral direction. Any other requirements of this Settlement may be modified in writing by mutual agreement of the parties.

101.100. If Respondent seek permission to deviate from any approved work plan, schedule, or SOW, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the EPA Project Coordinator pursuant to ¶ 90.

102.101. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding any deliverable submitted by Respondents shall relieve Respondents of their obligations to obtain any formal approval required by this Settlement, or to comply with all requirements of this Settlement, unless it is formally modified.

XXVIII. NOTICES OF WORK COMPLETION

93. When EPA determines that all Work has been fully performed in accordance with this Settlement with respect to the Arkema SOW or the Bayer CropScience SOW, with the exception of any continuing obligations as provided in ¶ 95, EPA will provide written notice to Respondents. Respondents may request that EPA make this determination.

Commented [ES33]: EPA 12-26-19: edits to allow for 2 NOCs

94. If EPA determines that any such Work has not been completed in accordance with this Settlement with respect to the Arkema SOW or the Bayer CropScience SOW, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the RD Work Plan if appropriate to correct such deficiencies. Respondents shall implement the modified and approved RD Work Plan and shall submit a modified Final 100% Report for EPA approval in accordance with the EPA notice. If approved, EPA will issue a Notice of Work Completion with respect to the Arkema SOW or the Bayer CropScience SOW, as applicable.

95. Issuance of the Notice of Work Completion does not affect the following continuing obligations: (1) obligations under Sections IX (Property Requirements), X (Access to Information), and XI (Record Retention); and (3) reimbursement of EPA's Future Response Costs under Section XIII (Payment of Response Costs) of the Settlement.

XXIX. EFFECTIVE DATE

96. This Settlement shall be effective upon signature by the Superfund and Emergency Management Division, EPA Region 10.

IT IS SO AGREED AND ORDERED;

U.S. ENVIRONMENTAL PROTECTION AGENCY:

Dated

Superfund and Emergency Management Division
EPA Region 10

Signature Page for Settlement regarding the Portland Harbor Superfund Site

FOR Arkema Inc.:

Dated

Danny Kite
President
Legacy Site Services LLC, agent for Arkema Inc.
1201 Louisiana Street, Suite 1800, Houston, TX 77002

Signature Page for Settlement regarding the Portland Harbor Superfund Site

FOR _____ :
[Print name of Respondent]

Dated

[Name]
[Title]
[Company]
[Address]

DRAFT